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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-695

BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI; MEMBERS OF THE BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI, Individually and in Their Official Capacities, et al.,

Petitioners,

vs.

CHARLOTTE HOROWITZ,

Respondent.

BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERITORARI

To the United States Court of Appeals for the Eighth Circuit

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STATEMENT OF THE CASE

Respondent, Charlotte Horowitz, was accepted by the University of Missouri-Kansas City (U.M.K.C.) Medical School as an advanced standing student (Stipulation No. 23) for its first year of operation (Stip. Nos. 4 anc 22). Horowitz's credentials included a B.A. from Barnard College in chemistry, a M.A. in psychology from Columbia University, graduate work at Duke University and the National Institutes of Health Graduate Program at Bethesda, Maryland (Stip. No. 8) with a 3.8 on a 4.0 grade

scale in 33 semester hours (Stip. No. 10). Her Graduate Record Examination scores were as follows:

Verbal Aptitude	760	99.3 %ile
Quantitative Aptitude	770	99.4 %ile
Advanced Psychology	830	99.9 %ile
Advanced Chemistry	840	99.9 %ile (Stip. No. 9),

and scores on the Medical College Admissions Test of:

Verbal Aptitude	655
Quantitative Aptitude	645
General Information	735
Science	735

with 735 being in 99 %ile (Stip. No. 12). Clearly, Horowitz has an outstanding academic record. These academic achievements were supported by recommendations from people who were familiar and impressed with her work (Stip. Nos. 18 and 19). Upon entering U.M.K.C., Horowitz took the National Board Mini-Test scoring first in the school in basic science and second in clinical studies (Stip. No. 27) and the Minnesota Multiphasic Personality Inventory Psychological test. This test measures, among other factors, mental maturity and emotional stability. Horowitz tested within the normal range for all clinical test categories (Stip. No. 28).

Studies at the medical school were divided into rotations, the docent unit being appellant's first rotation from September, 1971 through December, 1971 (Stip. No. 29). The docent rotation at U.M.K.C. Medical School is the primary educational block of the curriculum where each student has frequent and close contact, within a small group of students, with a faculty member, the docent. The docent maintains this close relationship with the same small group of students throughout their years of instruction. Fifteen

hours of credit were recorded on appellant's transcript for her initial docent rotation (P.Ex. 83). Students did not receive letter grades or written evaluations of their performance (Tr. pp. 111, 112, 320) but rather received a credit or no credit on their transcripts (Stip. No. 82). Therefore, students determined whether they passed a rotation satisfactorily by whether they received credit on their transcripts and by what their docents told them. They were not allowed to read their rotation evaluations (Tr. p. 112; Dennis Depo. p. 36). Further, the policies and regulations of the medical school do not state the numbers or types of courses which are required for graduation (Stip. No. 92).

In December, 1971, Horowitz took Independent Studies and received "credit." (Stip. 29, P.Ex. 83). Similarly, she received credit for her Pathology/Anatomy rotation in January-February, 1972 (Stip. 29, P.Ex. 83) and for her Pediatrics rotation in March and April (P.Ex. 83, Tr. p. 110).

Her next rotation in May, 1972 was Community Blood Bank for which she also received credit. Horowitz spent the summer at Menninger's Clinic in a psychiatry rotation for which she received credit (P.Ex. 83, Stip. No. 49).

Dr. William Sirridge, who as Miss Horowitz's docent oversaw and directed her education (Tr. p. 101), recommended her for advance standing as a year VI student in a letter and evaluation report of June 9, 1972 finding her above average in all respects (Stip. Nos. 42, 43, P.Ex. 32). Shortly thereafter, Dr. Ned Smull, Chairman of the Council on Evaluation, sent a letter dated June 29, 1972, to Dean Noback setting forth reasons that the Council on Evaluation believed that Horowitz required more than one academic year before meeting graduation standards. Horowitz was not informed that the Council on Evaluation would review

her status nor was she invited to attend. Similarly she was neither informed of, invited, nor permitted to attend any of the subsequent meetings of the Council or of the Co-ordinating Committee, nor was she even allowed to submit any documents or arguments in writing on her own behalf (Tr. pp. 236, 202, 208). Horowitz never saw or heard of the Smull correspondence (P.Ex. 33). As a result of this correspondence, she was sent two letters on July 5, 1972 from Dean Noback. The first was a memorandum listing the class designations for advanced standing students noting that she had been elevated to year VI, the most advanced of the student classifications, representing the final year of medical school (P.Ex. 35).

The second letter to Horowitz reiterated the substance of a prior conference at which she was informed that she was being placed on probation, but was advanced pursuant to schedule without an indication of her probationary status on her transcript (P.Ex. 36).

Horowitz was not asked to nor did she appear before either the Council on Evaluation or the Coordinating Committee prior to the decision to put her on probation (Stip No. 53, Tr. p. 236, P.Ex. 36). The conference informing her that she had been placed on probation was the first time the topic of probation had been discussed with her. At this conference Dean Noback acknowledged that her acquisition of information had been good. He gave the following reasons for placing her on probation:

> "Your acquisition of information is good. Your relationship with others has not been good and represents a major deficiency. You need to improve your relationship with others rapidly and substantially. This involves: Keeping to established schedules; meeting all clinical responsibilities on time and gracefully; attending carefully to personal appearance including

> hand washing and grooming; participating appropriately in the activities of the School; and directing criticism and suggestions maturely to your Docent and to the faculty member who is in charge of a curriculum block as you may have criticisms and suggestions." (P.Ex. 35)

Shortly after these letters her docent, Dr. William Sirridge, wrote a letter of recommendation dated August 10, 1972 indicating that Miss Horowitz had the highest class standing (P.Ex. 39). In another letter of recommendation dated August 17, 1972, written to Menninger Clinic at the request of Horowitz in respect to her application seeking admission into the clinic's residency program in psychiatry, Dr. Sirridge said he had no hesitancy in recommending her for a straight internship in psychiatry (Stip. No. 46, P.Ex. 40).

The following Fall, 1972, Horowitz ranked first on her National Board Examination Part I (Stip. 51). During that Fall Horowitz was in her docent unit rotation and was evaluated by her docent as having unsatisfactory clinical skills but was highly satisfactory and superior in all other categories (Stip. No. 50, P.Ex. 95). She received credit for the rotation (Stip. No. 49).

The Provost, E. Grey Dimond, issued a notice on November 22, 1972, promulgating rules and procedures of the U.M.K.C. Medical School (Stip. No. 48, P.Ex. 46). During December of 1972, Horowitz took an independent study rotation and received credit for the course, as she had for all courses she had taken (Stip. No. 29). During her obstetrics gynecology rotation, for which she also received credit, she was informed, January 26, 1973, that the Council on Evaluation had recommended that she not graduate in May of 1973 (Stip. No. 57). Further on February 7,

1973 she was informed in writing that the Coordinating Committee had met and accepted the Council on Evaluation's recommendation that she not graduate (P.Ex. 53, Stip. No. 58). She was informed that if she was dissatisfied with this decision she could take a set of oral and practical exams. This letter stated that Horowitz must make "very marked and very substantial improvement" in the areas of "clinical competence, peer and patient relations, personal hygiene and ability to accept criticism."

By letter of February 9, 1973, she elected to exercise the option of practical exams (P.Ex. 54, Stip. No. 59). After procedures were created for the practical exams, none having existed before this date, Horowitz was notified on March 15, 1973 that she was to be examined by seven physicians who had been instructed to "provide a careful, detailed and thorough assessment of (her) abilities . . ." (Stip. No. 60, P.Ex. 57). That same day the seven doctors were sent letters explaining the process by which Horowitz would be examined (P.Ex. 58) and Dean Noback prepared a memorandum which described the method of tallying the results of the seven physicians' examinations (P.Ex. 59). As the Court of Appeals found: "The Dean informed the seven physicians by letter and a meeting that they were to make one of three recommendations: a) graduation on schedule; b) continued probation and reassessment of her status in May, 1973; c) dismissal from the medical school." 538 F.2d at 1320 (Pet. App. A-5). During March and April, Horowitz was on the surgery rotation for which she received credit (Stip. 29, P.Ex. 83).

The seven doctors each sent letters regarding their evaluations of her (P.Ex. 60, 61, 63, 64, 65, 66, 68). Although the letters of the doctors do not easily fit into categories, it is evident that four of the seven doctors recommended that Horowitz either be allowed to graduate or remain in school on probation. These evaluations and recommendations did not follow the categories of recommendations specifically set out in Dean Noback's letter to the doctors (P.Ex. 58) nor were the evaluations tallied pursuant to Dean Noback's tallying procedure (P.Ex. 59, Tr. pp. 47, 48). The procedure for tallying the results of the recommendations (P.Ex. 59) required the Dean to call the seven examining physicians together if there was no clear majority evident from their letters. As the Court of Appeals found: "Although there was no clear majority opinion the panel was not called together as the procedures contemplated." 538 F.2d at 1320 (Pet. App. A-5).

Quarterly exams were given in May, 1973 on which Horowitz ranked second in her class in total score (Stip. No. 94).

The Council on Evaluation met May 1, 1973 and voted again that Horowitz would not graduate in May, 1973 (P.Ex. 67, Stip. No. 66). The Coordinating Committee on May 7, 1973 voted to sustain the Council's recommendation that she not be allowed to graduate (Stip. No. 71, P.Ex. 69). Following the decision of the Coordinating Committee on May 7, 1973, Dr. Sirridge, Dr. Smull and Dr. Noback met with Horowitz to tell her that both the Council on Evaluation and the Coordinating Committee had met and decided that her appeal to graduate would be denied and she would not graduate at that time. This meeting was confirmed by two letters dated May 11, 1973 (P.Ex. 70). Next the Council on Evaluation met on May 14, 1973 and recommended that Horowitz not be allowed to re-enroll barring receipt of reports that she had improved radically (Stip. 72, P.Ex. 73). On May 18, 1973 Dean Noback sent another letter to Horowitz reiterating their discussion of May 7, 1973 and informing her that the Council on Evaluation

would be meeting at some time to consider the extent to which she had improved (P.Ex. 71).

Horowitz's Emergency Room evaluation was submitted on May 25, 1973 and was the first course for which she received a no credit (Stip. No. 75, P.Ex. 94). She was the first student to take an Emergency Room rotation at Menorah Hospital (Stip. No. 76) and had taken the one hour course during the midst of the serial meetings of various councils and committees which were deciding her status at the school. Finally, on May 28, 1973, the Council on Evaluation voted to dismiss Horowitz from the medical school (P.Ex. 77, Stip. No. 73) and on June 4, 1973 the Coordinating Committee accepted the recommendation of dismissal (P.Ex. 78, Stip. No. 77) which was in turn upheld by Dean Noback. On July 6, 1973 Dean Noback formally informed Horowitz that she had been dismissed from the University of Missouri at Kansas City School of Medicine (P.Ex. 96, Stip. No. 78).

Horowitz was dismissed from the medical school for having allegedly failed to make adequate progress with regard to four areas, one arguably academic and three behavioral. In a letter from Dr. Smull to Dr. Sirridge (P.Ex. 49) the alleged deficiencies of Horowitz were listed as clinical competence, peer and patient relations, personal hygiene, and ability to accept criticism. Although Horowitz has consistently denied these behavioral charges and although Dr. Dennis in his deposition stated that the allegations were of questionable validity, Horowitz has never been given an opportunity to appear at a hearing and rebut them. In this regard, Dr. Marjorie Sirridge, a member of the Coordinating Committee which finally made the recommendation that Horowitz be dismissed, stated for the minutes of the meeting of June 4, 1973 (P.Ex. 78) that she believed Horowitz had been the victim of prejudice by faculty staff and examiners, and she testified that because Horowitz was a woman she had been held to higher standards than other students (Tr. pp. 68-70). At none of the several meetings of the Council on Evaluation or the Coordinating Committee was Horowitz permitted to defend herself and rebut these allegations.

At no time prior to the filing of this lawsuit was Horowitz allowed to see the evaluations of her performance during any course rotations (Tr. pp. 187, 320) nor was she allowed to see or review the doctors' reports made during her rotation (Stip. No. 40; Tr. pp. 112, 230, 320). She never was allowed to appear before any session of the Council on Evaluation or the Coordinating Committee on her own behalf (Stip. No. 65; Tr. pp. 64, 82, 91, 121, 217, 466) nor was she ever informed prior to a meeting when these committees would be considering her status (Stip. Nos. 45, 57, 74, 78; Tr. pp. 236, 202, 238; P.Ex. 36, 53, 70). Her docent, Dr. William Sirridge, was her only contact with her course evaluations. She discussed with him his docent recommendations but she never actually saw them. She assumed they were substantially the same as he discussed with her (Stip. Nos. 42, 43, 44, 46). Dr. Sirridge never told Horowitz that her deficiencies were serious enough to result in her being put on probation, not graduating on time or being dismissed from school (Stip. No. 50; Tr. pp. 233, 240). Dr. Sirridge, as her docent, recommended to the Council on Evaluation that Horowitz be graduated (Tr. p. 144) but she was, instead, dismissed.

Prior to her dismissal, as the Court of Appeals found: "Horowitz was never given a chance to appear before the Council on Evaluation, the Coordinating Committee or the Dean, for a hearing during the dismissal procedure, nor was she informed of the time or place of any of their meetings. Neither was she given copies of the formal

evaluations or other evidence which the Council and the Committee considered." 538 F.2d at 1320 (Pet. App. A-6).

Subsequent to her dismissal from medical school, Horowitz was unable to take the employment that had been offered her by the University of North Carolina Medical School because that employment was conditional upon her receiving her medical degree. It is likely that Horowitz, who presently is unemployed and is taking graduate courses in a non-degree program in the Washington, D. C. area, will never be able to find employment in medicine or medically related fields nor will she ever be able to gain entrance to another medical school. The testimony of Dr. Hilliard Cohen that Horowitz had been stigmatized by her dismissal, that her dismissal was a "significant black mark" against her name, that she would have great difficulty finding employment or obtaining admission to a medical school, was uncontroverted at the trial (Tr. at 25-26). As the Court of Appeals held: "The unrefuted evidence here establishes that Horowitz has been stigmatized by her dismissal in such a way that she will be unable to continue her medical education, and her chances of returning to employment in a medically related field are severely damaged." 538 F.2d at 1321 (Pet. App. A-8).

Upon information and belief, the medical school is currently granting hearings to students who face dismissal. It is believed that seven students who were granted hearings were all allowed to "decelerate" their education by extending their studies for an additional semester or longer; one of these seven was dismissed after lack of success in "decelerated" study. As Dr. Mary Howell, former Assistant Dean of the Harvard Medical School, testified for Horowitz as an expert witness, giving students a hearing before imposing sanctions does not impede the mission of the medical school, it enhances it (Howell Depo. 51-52). Further, a

sister medical school, the University of Missouri at Columbia, under the supervision and direction of the same Board of Curators who are here Petitioners, has granted hearings to medical students since prior to the Horowitz dismissal at UMKC.

The medical school was placed on probation by the Joint Committee on Accreditation during the Summer of 1976, for reasons which included criticism of the grading and evaluation systems of the school. In its reply of August 8, 1976 the medical school referred to Horowitz (it is not known whether her name appeared in the report) as a rebuttal to that criticism. A representative of the medical school later was interviewed by a reporter for the *Kansas City Star* and again referred to Horowitz; such reference appeared without her name in an article in that paper on August 22, 1976: "The example was given of a student who received an excellent score on Part I of the exam, yet was dropped from the School for clinical deficiencies." The reference was clearly to Horowitz.

UMKC, as do most medical schools, requires applicants to explain fully the reasons for being required to leave any prior institution of higher education (P.Ex. 10). Horowitz thus cannot escape the allegations made against her by the medical school, allegations she had no opportunity to refute.

REASONS FOR DENYING THE WRIT

This Court should deny the petition for a writ of certiorari here sought because this case presents none of the considerations of Rule 19 which would support granting the writ. This case presents no important questions of federal law which need be settled by this Court, the decision of the court of appeals below was not in conflict with the decisions of other courts of appeal and was, in fact,

fully in accord with the decisions of this Court, as argued herein. Further, the court of appeals has not "so far departed from the accepted and usual course of judicial proceedings," Rule 19(1)(b), to require this Court to exercise its discretion to correct an injustice by granting the writ. For the reasons herein argued, this case was properly decided by the court of appeals and this Court should deny the writ here sought.

1. Respondent Is Entitled To Due Process Prior To Dismissal From Medical School Because Her Dismissal Is Based Upon Allegations Of Misconduct Or Behavioral Inadequacies.

Horowitz was entitled to procedural due process because her dismissal from medical school was not based exclusively upon an evaluation of her academic performance. It was based substantially upon behavioral characteristics Horowitz was alleged to have exhibited. The academic achievements of Horowitz were outstanding. Her scores on the National Board Examination were among the highest in her class and ranked her most favorably with other medical students throughout the nation. Her scores on the quarterly examinations administered by the medical school ranked her near the top of her class and she received credit for all clinical rotations except the last. She was, nevertheless, dismissed from the medical school for deficiencies denominated as failures to make improvements in clinical competence, peer and patient relations, personal hygiene and her ability to accept criticism. Three of these four areas of alleged failures on the part of Horowitz wholly concern characteristics of her behavior. See *Goss* v. *Lopez*, 419 U.S. 565, 42 L.Ed.2d 725, 95 S.Ct. 729 (1975) and *Dixon* v. *Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

The allegation that her peer and patient relations were not adequate was concerned primarily with her alleged inability to get along with fellow medical students. There is nothing in the record to indicate her inability to get along with patients. The record is clear that her inability to get along with fellow medical students was caused substantially by differences between her and her fellow students, differences over which she had no control. Dr. Marjorie Sirridge, a docent at the medical school and a member of the Coordinating Committee, testified (Tr. pp. 68-70) that Horowitz had been the victim of prejudice throughout her experience at the medical school because she was a woman and because, in the eyes of members of the medical school community, she did not ". . . exemplify what they felt they were looking for in her appearance." (Tr. p. 69). See photographs of Horowitz, P.Exs. 111, 112 and 113, concerning her appearance.

Similarly, Dr. Dennis, in his deposition, made it clear that Horowitz, because of her unattractive appearance, Eastern accent, and her narrow interests, became the joke of the medical school and the recipient of practical jokes and exclusions from normal social relationships. Whether the failure to establish adequate peer relationships was caused by Horowitz or was beyond her control is the type of factual determination best made by the medical school, with the protections afforded to students by minimal procedural due process. See *Brookins* v. *Bonnell*, 362 F.Supp. 379 (E.D.Tenn. 1973) where the Court held that similar allegations of a student's non-conformance with school regulations required the protections of due process.

The allegation that Horowitz was deficient with regard to personal hygiene related to a charge that she had too frequently worn lab coats that were either dirty or had yellowed, her alleged failure to keep her hair neatly

combed, and her alleged failure on at least two occasions to have adequately cleaned her fingernails. These allegations clearly raise factual issues, issues preferably resolved by a procedure that provides for input by the student and response by the student to allegations made against her. Allegations such as these are not academic; they are allegations of specific conduct deemed to have been inappropriate and as such are capable of being resolved as are any other factual disputes before administrative bodies.

Finally, the alleged inability of Horowitz to accept criticism raises a similar distinct factual issue capable of being resolved in a like manner. To the extent that the dismissal of Horowitz from medical school was based significantly upon any of these allegations of inappropriate conduct, as indeed her dismissal was, she should have been afforded, at a minimum, notice of the specifics of the general allegations and an opportunity to appear before, speak to, and submit documents to the committee that was charged with the ultimate responsibility of making factual determinations on these issues. It is conceded by the medical school that plaintiff was not afforded even these most minimal procedural protections. She in fact was given no notice that her status at the medical school would be considered by any of the committees at any time.

The evidence established that the scholastic and academic achievements of Horowitz were not at issue in her dismissal (P.Ex. 78); rather, behavioral requirements subjectively established by the medical school were the chief concern (Stip. Nos. 35, 36, 38, 45, 54; Tr. pp. 29, 36, 120, 127-130, 165-166, 168, 217, 218, 428, 435, 478; P.Exs. 58, 32, and 36). No dispute exists as to the behavioral aspect of Horowitz's alleged unsatisfactory performance. Dean Noback (Tr. p. 428), Dr. Smull (Tr. p. 478), and Dr.

William Sirridge (Tr. p. 120) all agree as to that fact. Dr. William Sirridge, docent of Horowitz, testified:

> Q. Primarily, had her deficiencies been behavioral?
>
> A. Her deficiencies were behavioral enough. . . (Tr. p. 120).
>
> Q. . . . so from the time she was placed on probation until May 1, 1973, she presumably received credit for having performed satisfactorily in all her rotations in terms of the academic or scholastic aspects in any event, is that correct?
>
> A. As far as I know.
>
> Q. The only problems that continued are the behavioral problems that we listed earlier?
>
> A. Correct (Tr. p. 130).

These behavioral factors included allegations of absenteeism, relationships with other people, meeting clinical responsibilities gracefully and on time, personal appearance, participation in school activities, and directing criticism and suggestions maturely (Stip. No. 45). These are all matters of fact which could and should have been resolved in a due process setting where Horowitz would be given notice and an opportunity to appear and be heard in her own defense. The charges leveled against Horowitz do not involve standards of "achievement in an esoteric academic field," *Brookins* v. *Bonnell*, *supra* at 383. They involve, instead, factual questions customarily resolved in a fact-finding hearing.

Thus, where Horowitz was dismissed from medical school for reasons other than simply her course failure or her failure to meet scholastic or academic performance criteria, she was entitled to the minimal protections of due process. Where Horowitz was dismissed for such behav-

ioral characteristics or conduct as personal appearance, participation in school activities, and wearing a yellowed lab coat, allegations of fact well-suited for resolution in a fact-finding forum, Horowitz was denied procedural due process by not having been given written notice of the charges against her and an opportunity to appear before the appropriate committees and rebut such allegations.

2. The Court Of Appeals Properly Held That Respondent Was Entitled To The Protections Of Due Process Because The Evidence Was Uncontroverted That She Had Been Significantly Stigmatized By The Dismissal.

Although Horowitz contends that her dismissal from medical school was for conduct related reasons and she is therefore entitled to the benefits of due process, even if her dismissal were for academic deficiencies she is entitled to due process. Horowitz was dismissed from the medical school in a manner that deprived her of liberty and property by interfering with her right to complete her medical education and by seriously damaging her standing and associations within the medical community. *Board of Regents* v. *Roth*, 408 U.S. 564, 573, 33 L.Ed.2d 548, 558, 92 S.Ct. 2701 (1972), by demeaning her "good name, reputation, honor or integrity." *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437, 27 L.Ed.2d 515, 519, 91 S.Ct. 507 (1971), and by imposing on her "a stigma or other disability" that has precluded other employment and educational opportunities in the medical field, *Board of Regents* v. *Roth*, *supra*, at 574, 33 L.Ed.2d at 559.

On June 4, 1973, the Coordinating Committee of the school voted to terminate Horowitz by a vote of five for termination, no votes against termination and three abstentions (P.Ex. 78). The minutes of that meeting reflect the

reasons for her dismissal and the concerns of members of the committee. The rationale for the dismissal was whether Horowitz had made sufficient improvement since July, 1972, when she had received a letter from the Dean informing her that she should make improvement in the areas of keeping to established schedules; meeting all clinical responsibilities on time and gracefully; attending carefully to personal appearance including hand washing and grooming; participating appropriately in the activities of the School; and directing criticisms and suggestions maturely to her Docent (P.Ex. 36). Although Horowitz had been advised that these matters were of concern to the school when she was placed on probation in July, 1972, she had never been informed that they might form the basis for her dismissal from the medical school. She was, in fact, never even advised that the Coordinating Committee would meet in June, 1973 to consider her dismissal.

The recommendation of the Coordinating Committee that she be dismissed was upheld by the Dean and the minutes reflecting that action were placed in her student file where they were accessible to other medical schools or employers. Dr. Hilliard Cohen testified (Tr. pp. 25-26), that as a result of the action of the medical school Horowitz now suffers a significant disability in that she is likely to be precluded from attending any other medical school and, similarly, she is likely to be excluded from many employment opportunities in medically related fields. The disabilities suffered by Horowitz are particularly acute because of the reasons for her dismissal. She had a superior record of academic achievement and her dismissal for behavioral characteristics worsens the disability placed upon her. Because she was dismissed for her alleged failure to make sufficient improvement in the areas of clinical competence, peer and patient relations, personal hygiene,

and the ability to accept criticism (P.Ex. 78), her dismissal from the medical school has stigmatized her future in medicine or medically related fields. Dr. Cohen, whose testimony was uncontroverted, was asked whether in his opinion a dismissal from medical school for the reasons as those suffered by Horowitz would be substantially disqualifying to an applicant seeking employment in medically related fields and he answered:

> Yes, I think it would be a significant black mark against that person's name, I think it would stigmatize that individual, I think that person would probably be—well, would have great difficulty to get into another medical school, if at all (Tr. p. 26).

Dr. Cohen, who, as a medical doctor, an educator and an administrator had over 30 years experience hiring physicians and medical personnel, testified that Horowitz, because of her dismissal, was virtually precluded from future employment or educational opportunities in the medical field. Where medical schools require, as this one does (P.Ex. 10), applicants to explain fully reasons for dismissal from previous schools, it is reasonable that Dr. Cohen believes that Horowitz has been permanently stigmatized. In applying to other medical schools, as Horowitz has done without success since her dismissal, Horowitz is required to explain that she was dismissed because of reasons that include "attending carefully to personal appearance, including hand washing and grooming" (P.Ex. 36) and "peer and patient relations, personal hygiene and ability to accept criticism" (P.Ex. 53), all allegations against which Horowitz was never permitted to defend herself. Where, as here, the dismissal has such permanent effects and where, as here, attempted re-entry into the medical field assures dissemination of the reasons for dismissal, the publication doctrine of *Bishop* v. *Wood*, 48 L.Ed.2d 684, 96 S.Ct. 2074 (1976) is inappropriate. As the Court of Appeals found, 538 F.2d at 1320 (Pet. App. A-7), the medical school's own application for admission (P.Ex. 10) forces such disclosures.

The action of the medical school thus denigrated the ability of Horowitz to perform as a professional in medicine or medically related fields, going well beyond a mere recitation of alleged failure to perform to the standards of the medical school, depriving her of a significant interest in liberty. Thus, because the medical school imposed upon Horowitz a ". . . stigma or other disability . . ." that foreclosed her freedom to take advantage of other opportunities she is entitled to the benefits of procedural due process, *Board of Regents* v. *Roth*, 408 U.S. 564, 573, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972); *Greenhill* v. *Bailey*, 519 F.2d 5 (8th Cir. 1975); *Wellner* v. *Minnesota State Junior College Board*, 487 F.2d 153 (8th Cir. 1973).

3. Respondent Was Denied Due Process By The Failure Of The Medical School To Follow Its Own Rules And Regulations In Dismissing Her.

Even if the medical school was not required to provide Horowitz with minimal due process, a contention she denies, the medical school is required to follow its own rules and regulations. Where institutions grant procedural protection in excess of the protections required by law such institutions must follow their own procedure. *Service* v. *Dulles*, 354 U.S. 363, 1 L.Ed.2d 1403, 77 S.Ct. 1152 (1957). See also *Behagen* v. *Inter-Collegiate Conference of Faculty Representatives*, 346 F.Supp. 602 (D.Minn. 1972), where the court stated:

> It is elemental that action beyond the scope of a body's own procedural regulations is in violation of due process of law.

Similarly, in *Warren* v. *National Association of Secondary School Principals*, 375 F.Supp. 1043 (N.D.Tex. 1974), it was held that where an educational institution creates procedural rights above a constitutional minimum, its own rules proscribe the boundaries of due process. The dismissal of Horowitz from the medical school was deficient when measured against its own rules and regulations, in two respects.

First, Provost Dimond circulated a memorandum setting forth newly promulgated procedures of the medical school relating to the evaluation of students and the status of students at the medical school. This memorandum was made available to students in the December 11, 1972 School of Medicine Newsletter (Stip. No. 48) and set out the procedures to be followed regarding a student's probation or removal from school. Paragraph 7 of this letter (P.Ex. 46, 110) provided that the Council on Evaluation would normally review evaluation forms of the students, results of quarterly examinations, and the recommendations of the docent for each student. The procedure provided, further, that if the Council on Evaluation "finds itself operating without adequate information, it has the responsibility of calling the student forward for an interview. . ." The Council on Evaluation did, in fact, find "itself operating without adequate information" and utilized, as Dean Noback testified, (Tr. p. 178) peer evaluations which he described as taking place when "students are on concurrent assignments in any of the major curriculum rotations." He went on to testify that peer evaluations put "in the hands of the Evaluation Council on a sequential basis the assessment of individuals about the performance characteristics of the students. . ." Even though the Council on Evaluation thus acquired additional information beyond the three usual sources it failed to call Horowitz forward

for an interview as required by its own rules and regulations. Thus, Horowitz was denied the only opportunity for a hearing which the rules provide to her in a situation where her status at the school was in jeopardy. Failure of the medical school to follow its own regulation deprived Horowitz of due process.

Secondly, the medical school failed to follow its own procedures for determining the results of a set of oral and practical examinations administered to Horowitz. On March 15, 1972, Dean Noback sent a letter to each of seven physicians who had been asked to give oral and practical examinations to Horowitz. This letter of instruction (P.Ex. 58) asked the physicians to reach one of three possible recommendations: that she graduate on schedule, that she remain on probation, or that she be dropped from the medical school. Simultaneously, Dean Noback prepared a memorandum establishing the procedure for compiling the recommendations of the panel of examining physicians (P.Ex. 59). This memorandum stated that a majority of the recommendations of the examining panel would determine the judgment of the panel. Further, if there was not a majority opinion, the Dean would call the panel together promptly to discuss the situation and the evaluation of the individual student. A numerical average of the examining panel's judgments would be used to resolve differences in judgment if there was not a clear majority opinion.

The letters of the seven examining physicians (P.Ex. 60, 61, 63, 64, 65, 66, and 68) when divided among the three possible recommendations required by Dean Noback (P.Ex. 58) reveal there is clearly no majority for any one of the three recommendations. The tallying memorandum of Dean Noback (P.Ex. 59) provided that if there was no majority opinion then the panel would be called together

to discuss the situation and the evaluation of the student. The seven examining physicians were never called together to participate in any type of discussion concerning Horowitz (Tr. p. 47) nor did they consult with each other (Tr. p. 48). It was further provided in the memorandum that a numerical average of the examining panel's judgment would be used to resolve any differences in judgment if there was not a clear majority opinion. However, there was no numerical tally, nor provision for such, provided to the examining physicians (Tr. p. 48). Dean Noback admitted that the tallying memorandum and the creation of the examining panel were additional parts of the student evaluation process outlined in the November 22, 1972, letter of the Provost (Tr. p. 189).

The medical school failed to follow its own rules by not carrying out the further requirements of the tallying memorandum for a conference of the examining physicians and failing to utilize a non-subjective numerical method for determining the judgment of the panel. The failure of the medical school to carry out the announced procedure denied Horowitz the due process she reasonably could expect as announced and outlined in the regulations of the medical school. This departure from the medical school's printed procedures was in itself a denial of due process.

Thus, in two important respects Horowitz was denied the protection ostensibly afforded to students at the medical school by the institution's own rules and regulations. She was not called in for an interview before the Council on Evaluation and was thus denied her only opportunity for even the semblance of a hearing. In addition, after her clinical skills were reviewed by a panel of examining physicians the medical school failed to follow its own procedure for tabulating the results of that review process. Each of these failures substantially prejudiced the ability

of Horowitz to protect her status at the medical school. The failure of the school in these two respects was especially harmful to her where the regulations of the school did not otherwise provide means for Horowitz to rebut allegations against her or to present her view of factual controversies. Thus, even the extremely minimal procedural protections afforded by the school's own rules, particularly important in light of the paucity of other procedural protections, were denied her.

4. Respondent Was Denied Substantive Due Process Because Of The Arbitrary And Capricious Nature Of Her Dismissal.

Although courts will not normally substitute their view for that of an educational institution as to the fitness of a student for graduation, where the decision to dismiss a student is arbitrary or capricious the courts will set it aside. *Connelly* v. *University of Vermont and State Agricultural College*, 244 F.Supp. 156 (D.Vt. 1965); *Keys* v. *Sawyer*, 353 F.Supp. 936 (S.D.Tex. 1973). As has been noted, the standard is a narrow one. *Greenhill* v. *Bailey*, 519 F.2d 5, n.12 (8th Cir. 1975). The decision to dismiss Horowitz from the medical school was, however, under the circumstances of her educational experience both arbitrary and capricious, and the evidence supporting that conclusion is compelling.

A. The Decision to Dismiss Horowitz Was Summarily Reached

Horowitz was never informed that the review of her status at the medical school might result in her dismissal. She was, in fact, informed in February, 1973, that she had not made sufficient improvements since being put on probation the preceding July and, therefore, would not be allowed to graduate in May. No recommendation had been

made at that time by the Council on Evaluation as to whether or not she would be dismissed from the medical school or allowed to continue her studies to make up her deficiencies. Horowitz was informed that she might subject herself to a set of oral and practical examinations by a panel of seven physicians, an option she elected to take advantage of.

After the panel of physicians had reported to the Dean and the Council on Evaluation had reviewed those reports Horowitz was informed by the letter from Dean Noback on May 11, 1973 (P.Ex. 70) that the decision of the Council on Evaluation that she not graduate that month would not be changed. Even at that late date she was not informed that she would face dismissal from the medical school. In fact, both the Council on Evaluation and the Coordinating Committee met several times within the next three weeks to consider her dismissal from the medical school, meetings of which she was given no notice nor was she even informed that they would be meeting at unspecified times for the purpose of considering her dismissal.

Under the circumstances prevailing at the medical school at that time this course of action was both arbitrary and capricious. The medical school had been formed only some two years before. Horowitz had been admitted at the time the medical school opened as an advanced standing student who expected to be able to graduate at the completion of two years study. Although the medical school had created a skeleton of procedures dealing with the evaluation of the progress of students through the school, those procedures had neither been carefully thought out nor given sufficient detail to be fair in their actual implementation.

Horowitz thus found herself in May, 1973, in a position that the medical school had not anticipated and, therefore, had not made provisions for dealing with. Horowitz had been told that she would not graduate in May, 1973, the opinions of seven examining physicians had been sought on whether she should graduate in May and of those seven, four recommended either that she graduate at that time or remain in the school on probation (P.Ex. 60, 61, 65, 68). The school, however, having established the procedure to obtain the judgment of the seven examining physicians chose to ignore it and, without notice to Horowitz, proceeded to dismiss her from the medical school that very month. The decision adopted pursuant to this ad hoc procedure was arbitrary in the extreme because: a) a procedure had been established to obtain the judgments of the examining physicians and those judgments were ignored; b) the examining procedure had been established to determine whether she would graduate or continue in the medical school and yet this purpose was altered without notice to Horowitz to form a basis for her dismissal; and c) it was reached by contemporaneously created procedures which failed to marshall the facts on the question ultimately reached, dismissal, rather than the question originally contemplated, non-graduation.

B. The Medical School Summarily Excluded the "Deceleration" Option

The dismissal of Horowitz was also arbitrary and capricious in a second major regard. Although several other students at this relatively new medical school had been "decelerated" in their studies, such an option was not made available to Horowitz. Dean Noback conceded in his testimony that students at the medical school had been "decelerated" in their progress through the school, a term that means they were given additional time to complete their education and make up courses in which their per-

formance had been unsatisfactory (Tr. pp. 213, 214). The practical effect of such a deceleration was to extend the stay of such students at the medical school and the purpose of it was to allow such students to obtain skills they otherwise did not possess. It provided an opportunity for students to obtain clinical skills, master concepts, learn facts, and acquire all the other usual attributes of a medical education. Dr. Marjorie Sirridge testified that not only did this medical school provide opportunities to students to extend their education but such opportunities are available in traditional medical schools as well (Tr. pp. 66-67). The failure similarly to provide an opportunity to Horowitz to extend her stay at the medical school to master those skills or concepts in which she was deemed to be deficient was arbitrary. It was especially arbitrary under these circumstances where the medical school, having not yet fully detailed its procedures for reviewing the status of students, had effectively precluded students from advancing their positions at a hearing before committees reviewing their status. Thus, where the "deceleration" option could be extended to students the denial by the medical school of an opportunity to Horowitz to appear before any of the evaluation committee meetings and present her case and, perhaps, argue the appropriateness of deceleration under the circumstances of her studies, makes the decision to dismiss her all the more arbitrary.

C. The Medical School Arbitrarily Changed Its Standards of Evaluation and Applied Them Ex Post Facto

The decision to dismiss Horowitz was arbitrary for a third significant reason. The standards by which the performance of Horowitz at the medical school was measured were altered during the course of her studies. In

the Spring of her first year at the medical school Horowitz spent two months in the Pediatrics rotation for which she received a "credit" on her transcript immediately upon completion of the course (Stip. No. 32). In spite of the fact that Horowitz had received credit for completion of the Pediatrics rotation the medical school, when considering her dismissal a year after her completion of the Pediatrics rotation, deemed her performance in that course to have been unsatisfactory (Stip. No. 33). Prior, however, to her dismissal from the medical school she had never been provided copies of the evaluation reports concerning Pediatrics (Stip. No. 40). Thus, Horowitz reasonably thought at the completion of her Pediatrics rotation that her performance had been satisfactory because the school, in choosing to signify her completion of the course on her permanent transcript had chosen the notation "credit" from among three possible notations, credit, no-credit, and incomplete. Although her docent and the Dean at some point in time learned that her performance in Pediatrics was being held against her in the consideration of her dismissal from the medical school, she was never informed that her performance was unsatisfactory (Tr. p. 187) and, therefore, she did not have an opportunity to seek permission to repeat the rotation even though such permission might well have been granted (Tr. pp. 187-188).

The practical effect of giving Horowitz credit for completing the course and then holding her performance in that course against her was to impose, post facto, a significant change in the standards of evaluation applied to Horowitz without giving her an opportunity to correct any deficiencies revealed by the more stringent standard adopted. Thus, the post facto imposition of a standard of review was arbitrary and capricious and worked to the substantial detriment of Horowitz when her status

at the medical school was reviewed, without notice to her, in May, 1973.

Similarly, in the Spring of her second year at the medical school, while she was on probation, Horowitz participated in a Surgery rotation and in an Obstetrics-Gynecology rotation and her performance in those rotations was deemed to have been satisfactory. In spite of her satisfactory performance in these rotations Dean Noback testified that in making the decision to dismiss her from the medical school these two rotations had "impacted negatively" upon her status at the medical school (Tr. pp. 431-433). Again, Horowitz was subjected, to her detriment, to a changing standard of evaluation. Whereas her performance in these two rotations had been deemed satisfactory at the completion of each course they were later utilized by the medical school as evidence supporting her dismissal because they had not been satisfactory enough. Such an alteration in the standards by which her performance was measured resulted in an arbitrary and capricious decision to dismiss her. Horowitz was entitled to rely upon her expectancy that the medical school would not change the standards by which her performance was evaluated without notice to her. She was entitled to rely upon her expectation that new standards of evaluation would not be retroactively applied to her. The changes in evaluation adopted by the medical school thus deprived Horowitz of a property interest in the completion of her education without arbitrary alterations in policy. Where the changes in policy resulted in the dismissal of Horowitz from the medical school, she was denied due process of law where no opportunity for a hearing was provided. *Perry* v. *Sindermann*, 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694 (1972).

D. The Dismissal of Horowitz Was Especially Arbitrary and Capricious in the Context of Her Medical School Experience

The dismissal of Horowitz from the medical school is made all the more egregious when the failure to provide her notice and an opportunity for a hearing, failure to allow her the "deceleration" option, the failure to accept the judgment of a majority of the seven examining physicians, and the application of shifting standards to the evaluation of her performance in pediatrics, surgery, and ob-gyn are viewed in context of the total experience of Horowitz at the medical school.

The medical school was established in 1971 as an experimental school designed to educate students to become "safe" physicians who had an orientation to the delivery of primary health care, either as family physicians, general practitioners, or clinicians. It was further hoped that the medical school would produce physicians to deliver medical care where it was most needed, in rural areas and in heavily populated urban centers. In spite of this conscious design to produce primary care oriented physicians, Horowitz was admitted as an advanced standing student with an expressed interest in research and a disinclination for concentration on "clinical instruction." (P.Ex. 10). One of the two interviewers who met with Horowitz before her admission to the medical school rated her good, very good, or excellent in all categories with the exception of personal appearance which was noted to be unsatisfactory. The interviewer wrote at the bottom of the interview sheet the following:

> The candidates (sic) personal appearance is against her—her interests in medicine are psychiatry—wants to teach in a med school—she has a slight speech

impediment—I don't believe she fits our program. (P. Ex. 15).

See photographs of Horowitz, P.Exs. 111, 112 and 113. In spite of the knowledge of at least some persons at the medical school of the inappropriateness of Horowitz for the clinically oriented structure of the medical school, she was admitted nevertheless. Her docent, Dr. William Sirridge, testified that if he had known of this interview report, Horowitz would not have been admitted to the medical school.

Dr. Marjorie Sirridge testified that the physical appearance of Horowitz was a drawback to her at the medical school in that it interfered with her clinical practice of medicine even though it was not an appropriate standard by which to measure a "safe" physician (Tr. pp. 74-75). The docent of Horowitz, Dr. William Sirridge, testified that to a certain extent the observation that Horowitz had become a class joke was correct and that in part this difficulty may have been caused by her physical appearance (Tr. pp. 104-105). Dr. Dennis testified that Horowitz was overweight, unattractive, unkempt, but not uncleanly, had a speech impediment, and was the joke of the medical school (Dennis Depo. pp. 8-9) in spite of her outstanding academic achievements. For these reasons a considerable amount of ill will was generated against her, among those students and a few faculty members, some of whom were in positions to influence her dismissal (Dennis Depo. pp. 7-11; 18-19; 22-27).

Thus it appears that in spite of her excellent academic and scholastic achievements, it became apparent to the medical school that Horowitz had neither the requisite personality nor appropriate physical appearance to be a "safe physician" in the mold in which the school was casting its students. Once a determination had been made

that she was not appropriate her dismissal became a certainty and she was dismissed notwithstanding the procedural niceties of due process or the problems created by such facts as credit she had earned in rotations or the majority judgment of the seven examining physicians that she either graduate or be continued on probation. When viewed in this context the medical school by not allowing her the option of "deceleration", by not giving weight to the judgment of the examining physicians, and by imposing upon her shifting standards of evaluation, acted arbitrarily and capriciously.

CONCLUSION

Respondent urges this Court to deny the writ of certiorari sought by petitioners. As the record of this case demonstrates, respondent was entitled to due process because her dismissal from the medical school was substantially for reasons of alleged inappropriate behavior, allegations she was not permitted to refute, because she was significantly stigmatized by her dismissal, because the medical school failed to follow its own rules and regulations, and because her dismissal was arbitrary and capricious. Respondent, whose academic achievements were outstanding, is entitled to elementary due process before her years of preparation for a medical career are so swiftly and permanently rendered useless. For these reasons respondent urges this Court to deny the Writ.

Respectfully submitted,

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